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Conflict of Laws- Long Arm Statutes--Sufficient Minimus Contact for In Personam Jurisdiction over Foreign Corporations

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The principal case represents the modern tendency, to permit real estate brokers to complete form contracts in their initial transactions while restricting the preparation of deeds and other subsequent documents to lawyers. This approach attempts to balance the public interest and public convenience. However, the West Virginia court's definition of "practice of law" obviously indicates that its primary concern is the protection of the public. Whether the West Virginia court will follow the principal case appears to depend on a future determination, based on *Earley*, whether "prepares legal instruments" includes a mere filling in of factual data in form contracts and must be completed by an attorney.

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Conflict of Laws—Long Arm Statutes—Sufficient Minimum Contact for In Personam Jurisdiction over Foreign Corporations

D1, a corporation, loaded goods on a railroad car in California destined for South Dakota. *D2*, a corporation, was in charge of transporting the goods from California to Kansas where they were placed on another carrier for transport to South Dakota. Therefore, *D2* had no contracts within South Dakota. *P* was injured in South Dakota while unloading the goods. The injury was caused by the alleged negligent loading and transporting of the goods which occurred outside the State of South Dakota. *P* brought an action against *D1* and *D2* for the injuries received in South Dakota under South Dakota's "long arm" statute. The statute provides that when a foreign corporation commits a tort "in whole or in part" in South Dakota, against a resident, such corporation will be subject to in personam jurisdiction. *D1* and *D2* moved to quash South Dakota's jurisdiction on the grounds that they could not be reached under South Dakota's "long arm" statute. *Held*, motions granted as to both *D1* and *D2* but with leave to amend in respect to *D1*. Although the injury occurred within South Dakota, the evidence failed to show that any of the events in the causal chain leading to the injury occurred within that state. Consequently, *D1* and *D2* did not have sufficient minimum contacts to satisfy the constitutional requirements of due process.

Marsh v. Tillie Lewis Foods, Inc., 254 F. Supp. 490 (W.D.S.D. 1966).

In the landmark case of *Pennoyer v. Neff*,[1] the United States Supreme Court ruled that the due process clause of the fourteenth amendment prohibits a state from acquiring in personam jurisdiction over a nonresident defendant simply by serving process upon him outside the forum state or by publication. Due to the increasing development of commercial intercourse between the various states, the Supreme Court accepted the legal fictions of "implied consent",[2] "presence",[3] and "doing business"[4] as tests to determine whether a state had complied with the due process clause in obtaining in personam jurisdiction over foreign corporations. These tests were discarded by the Supreme Court in the case of *International Shoe Co. v. Washington*,[5] and the "minimum contact" test was adopted. Under this test, a foreign corporation must have certain minimum contacts within the territory of the forum state before the foreign corporation will be subject to that state's in personam jurisdiction. To establish minimal contact within a state, "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws".[6] The theory behind the Court's reasoning was that if a foreign corporation made these minimum contacts within the forum state, the maintenance of the suit in that state would not offend "traditional notions of fair play and substantial justice".[7]

Under this flexible test, many states have been expanding their jurisdiction over foreign corporations through their "long arm" statutes.[8] Several states have adopted "long arm" statutes similar to that of the principal case which permit the forum state to obtain in personam jurisdiction over a foreign corporation if it

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[1] 95 U.S. 714 (1878).

[2] Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899); St. Clair v. Cox, 106 U.S. 350 (1882).

[3] Louisville & N.R.R. v. Chatters, 279 U.S. 320 (1929); Green v. Chicago B. & O. R.R., 205 U.S. 530 (1907).

[4] American v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923).

[5] 326 U.S. 310 (1945).

[6] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[7] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[8] Annot., 25 A.L.R.2d 1202 (1952).

commits a "tort in whole or in part" within the forum state.[9] As a result of the adoption of these statutes, the question has arisen whether an act of negligence committed outside the forum state and resulting in an injury within the forum state will constitute sufficient minimum contact to satisfy the requirements of due process.

Many of the cases which have been faced with this question involve defective products manufactured outside the forum state and sold within. These cases have used certain guidelines as aids in determining whether the minimum contact exists. Factors which have been considered are: (1) the nature and character of the business; (2) the number and type of activities within the forum; (3) whether such activities give rise to the cause of action; (4) the special interests of the forum in granting relief; and (5) the relative convenience to the parties.[10] The burden and inconvenience of the corporation's defense of a suit in a foreign tribunal has been regarded as of little significance, at least by some courts,[11] and the interest of the forum in granting relief to one of its residents considered obvious.[12] Instead, the inquiry has tended to focus on whether the nature of the business and the extent of its activities should make it aware that its activities may have consequences in a foreign state, *i.e.*, the "reasonably foreseeable" test.[13] If the foreign corporation by its activity claims the benefit and protection of the foreign state's law, then conversely

[9] See Rosenblatt v. American Cyanamid Co., 260 U.S. 516 (1923). The discussion in the text is limited to those jurisdictions that have statutes containing the phrase commits a tort, "in whole or in part", in this state. State statutes which contain the words "tortious act" or "act or omissions" seem to be more limited in scope than the statute in the principal case. Thus, the constitutional issue of due process is seldom asserted. See Hearne v. Dow-Badische Chemical Co., 244 F. Supp. 90 (S.D. Tex. 1963). However, the Illinois statute which contains the words "tortious act" has been given a very liberal construction. For a discussion of the cases under the Illinois statute, see Currie, *The Growth of Long Arm*, 1963 U. Ill. L.F. 533.

[10] Hearne v. Dow-Badische Chemical Co., 224 F. Supp. 90 (S.D. Tex. 1963) (valve manufactured by foreign corporation in foreign state shipped to Texas where it caused injury); see Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965).

[11] Aftanase v. Economy Baler Co., *supra* note 10; Anderson v. National Presto Indus. Inc., 135 N.W.2d 639 (Iowa 1965).

[12] The courts may find it more difficult to find a special interest in granting relief to a nonresident. A long arm statute such as the one in the principal case limits its application to its own residents. S. D. Laws 1961, ch 27. However, the language in the West Virginia statute seems to be applicable to nonresidents. W.VA. CODE ch. 31, art. 1, § 71 (Michie 1966).

[13] Ehlers v. United States Heating & Cooling Mfg. Corp., 276 Minn. 56, 124 N.W.2d 825 (1963); Anderson v. National Presto Indus. Inc., 135 N.W. 2d 639 (Iowa 1965).

it should be subject to suit under the same laws. Hence, if a corporation is national in character, in the business of mass production and places its product on the market without regard to state lines, it will be considered as doing business in any state where its products cause injury.[14]

The foreign corporation has been found amenable to the forum state's jurisdiction in both cases of direct sales and indirect sales. In the case of a direct sale, where the foreign corporation sells its product directly to a dealer in the forum state, the courts have little difficulty finding sufficient contact. These cases clearly fall within the test of *Hanson v. Denckla*[15] because the foreign corporation has claimed "the benefits and protection" of the forum state's law by performing "some act" within that state.[16] However, in cases involving indirect sales—where the product is sold outside the forum state and through subsequent exchanges in which the original seller is not involved reaches that state—the court, in determining whether there are sufficient contacts will be unable to find "some act" by the defendant in the forum state. To assert jurisdiction it must apply something akin to the "reasonably foreseeable" test.[17]

The principal case's holding that the mere fact of negligence resulting in an injury in South Dakota without more would not establish jurisdiction over the foreign corporations is consistent with the decisions of other cases interpreting similar "long arm" statutes. Thus, *D2*, a carrier, whose only participation in the causal chain of events leading up to the injury is transport of the goods outside, but not into, the forum state, cannot be subject to in personam jurisdiction. The allegedly negligent loading of the goods by the foreign manufacturer, *D1*[18] was also not sufficient contact for jurisdiction. The court, however, by granting leave to amend as to *D1* indicated that the foreign manufacturer could be subject to its jurisdiction. The manufacturer might have

[14] Ibid.; Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965); Keckler v. Brookwood Country Club, 248 F. Supp. 645 (N.D. Ill. 1965).

[15] 357 U.S. 235 (1958).

[16] *Id.* at 253.

[17] Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (valve sold outside state incorporated into another product sold in forum state), 50 GEO. L. J. 310 (1961); see Anderson v. National Presto Indus. Inc., 135 N.W.2d 639 (Iowa 1965).

[18] It is assumed that *D1* manufactured the goods even though it is not expressly stated in the opinion. The basis for this assumption is that the defendant manufactured the kind of products involved.

been reached if the plaintiff had alleged that: (1) the foreign corporation had entered into a contract to be performed in whole or in part in South Dakota, or (2) that the foreign corporation, by its direct sale into South Dakota, should have reasonably anticipated that its negligence would have consequences in that state. Concerning the second alternative, it is possible to distinguish the nature of the allegedly negligent act—negligent loading—from the defective product cases. This difference does not appear to be significant because in both cases the negligence occurs outside the forum state and the defendant's contact is based on the fact that his product is substantially connected with the injury.

West Virginia's "long arm" statute provides for in personam jurisdiction over a foreign corporation "if such corporation commits a tort in whole or in part in this State".[19] The West Virginia Supreme Court has never ruled whether an act of negligence committed outside the state which results in an injury within West Virginia will constitute sufficient minimum contact to enable the court to acquire in personam jurisdiction. However, this portion of the statute was interpreted by a United States District Court in the case of *Mann v. Equitable Gas Co.*[20] Here, a foreign corporation manufactured pipe in Texas, and sold it to a gas company in West Virginia, where it exploded, injuring the plaintiff. Under these facts, the mere occurrence of the injury did not fulfill the requirements of the minimum contact test, and if the statute were interpreted to confer jurisdiction in this case, it would be in violation of the due process clause. The court stated "that the commission of a tortious act within the state means that the alleged tort feasor, or his agents were in West Virginia at the time of his act, which is alleged to have resulted in this tort".[21]

Although the West Virginia Supreme Court has not specifically construed this section of the statute, the court has indicated that the statute should be given a more liberal construction. In the case of *Gavenda Bros. v. Elkins Limestone Co.*,[22] the West Virginia Supreme Court upheld the validity of a judgment rendered by

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[19] 59 W. VA. L. REV. 369 (1957).
[20] 209 F. Supp. 571 (N.D. W. Va. 1962).
[21] *Id.* at 574.
[22] 145 W. Va. 732, 116 S.E.2d 910 (1960).

a court in Illinois, against a West Virginia resident, where in personam jurisdiction was obtained through the Illinois' "long arm" statute. The West Virginia Court recognized that the purpose of the Illinois statute is to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause of the United States Constitution. The court then stated that he purpose of West Virginia's "long arm" statute is in harmony with the purpose evidenced by the Illinois statute. Another indication that the court may give this section of the statute a liberal construction is the decision in *State ex rel. Coral Pools, Inc. v. Knapp.*[23] Here, the court construed the portion of West Virginia's "long arm" statute that provides for in personam jurisdiction over a foreign corporation "if such corporation makes a contract to be performed, in whole or in part, by any party thereto in this State".[24] In this case, an Ohio corporation entered into a parol contract with a West Virginia citizen by telephone to be performed in West Virginia. The Ohio corporation was not qualified to do business in West Virginia, and none of its officers or agents came within West Virginia in connection with the making or execution of the oral agreement. The court, noting the clear trend toward expanding the permissible scope of state jurisdiction over foreign corporations, nevertheless ruled that it would not be inconsistent with the traditional notion of fair play and substantial justice to subject the Ohio corporation to in personam jurisdiction in West Virginia.

In light of this decision and the statement made by the court in the *Gavenda* case, it is conceivable that the *Mann* case would be decided differently if it were relitigated today.

Ronald Ralph Brown

Constitutional Law—Duty to Warn Accused of Rights on Arrest

D was arrested at his home by city police officers, was taken into custody, was interrogated for two hours at the police station, and signed a confession involving him in kidnapping and rape. *D* was not informed at the time by police or others that he had a right to counsel, either retained or appointed. At the trial, in which the

[23] 147 W. Va. 704, 131 S.E.2d 81 (1963).
[24] W. VA. CODE ch. 31, art 1, § 71 (Michie 1966).